IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SPENCER WILLIAMS, JUDGE

309 ORIG

ROGER SCHLAFLY, PLAINTIFF, -VS- PUBLIC KEY PARTNERS, DEFENDANT.	NO. C 94-20512 SW SAN JOSE, CA THURSDAY JULY 17, 1997 PAGES 1 - 10

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APPEARANCES:

FOR THE PLAINTIFF:
ROGER SCHLAFLY
P.O. BOX 1680
SOQUEL, CA 95073
BY: ROGER SCHLAFLY
IN PRO PER

FOR THE DEFENDANT:
HELLER EHRMAN WHITE
& MCAULIFFE
525 UNIVERSITY AVENUE,
PALO ALTO, CA 94301-1900
BY: ROBERT T. HASLAM
ATTORNEY AT LAW

COURT REPORTER: TONYA C. NEGD, CSR #11486

COMPUTERIZED TRANSCRIPTION BY TURBOCAT

JULY 17, 1997 10:10 A.M.

THE CLERK: ALL RISE. THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA IS NOW IN SESSION, THE HONORABLE SPENCER WILLIAMS PRESIDING.

THE COURT: PLEASE BE SEATED.

THE CLERK: CALLING CASE NUMBER C 94-20512 SW, ROGER SCHLAFLY VERSUS PUBLIC KEY PARTNERS, ET AL. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

THE COURT: PLEASE INTRODUCE YOURSELVES FOR THE RECORD.

MR. SCHLAFLY: MY NAME IS ROGER SCHLAFLY AND I'M THE PLAINTIFF.

THE COURT: GOOD MORNING MR. SCHLAFLY.

MR. HASLAM: BOB HASLAM FOR PUBLIC KEY PARTNERS AND RSA DATA SECURITY.

THE COURT: YOU'LL BE CARRYING THE BURDEN TODAY?

MR. HASLAM: I'LL BE DOING THE ARGUMENT, I THINK HE HAS THE BURDEN.

THE COURT: ALL RIGHT, FINE.

I'D LIKE TO TAKE THE SCHNORR (PHONETIC) PATENT FIRST, THAT ISSUE FIRST, AND MR. SCHLAFLY HAVE YOU BEEN -- WHAT'S THE BASIS OF YOUR SUIT? YOU HAVEN'T BEEN THREATENED HAVE YOU, WITH A LAWSUIT ON THIS?

AREN'T YOU PREMATURE?

MR. SCHLAFLY: NO, BECAUSE I THINK THAT WHAT I HAVE DONE IS PRACTICED ADDITIONAL SIGNATURE ALGORITHM AND DEFENDANTS HAVE ARGUED, PROFESSOR SCHNORR HAS ARGUED IT, AND DEFENDANTS HAVE IMPLIED THAT THE SCHNORR PATENT COVERS ADDITIONAL SIGNATURE ALGORITHM.

THE COURT: THEY SAY THEY DON'T CARE IF YOU INFRINGE IT OR NOT.

MR. SCHLAFLY: THIS IS WHAT THEY'RE APPARENTLY SAYING NOW. THIS IS NEWS TO ME. IF THEY HAD SAID THAT THREE YEARS AGO MAYBE WE COULD HAVE SAVED SOME TROUBLE.

THE COURT: DECIDE THE CASE AS OF RIGHT NOW -- THINGS CHANGE DURING TRIAL OR PROCESS. IF THEY'RE NOT THREATENING YOU AND THEY NOW SAY, "WE DON'T CARE," IS IT STILL NECESSARY TO CHALLENGE THE VALIDITY OF THAT PATENT?

MR. SCHLAFLY: IF THEY'RE REALLY SAYING THEY DON'T CARE, THEN NO, I GUESS IT'S NOT NECESSARY, BUT WE'VE HAD THIS ISSUE ON THE TABLE FOR THREE YEARS. IF THAT'S WHAT THEY'RE SAYING, I'D LIKE TO GET THAT ON THE RECORD SO THAT'S DEFINITELY KNOWN THAT THAT'S WHAT THEY'RE SAYING.

THE COURT: WELL, MR. HASLAM, DO YOU BELIEVE WHAT'S HAPPENED SO FAR CONSTITUTES A THREAT OR A CHALLENGE?

MR. HASLAM: NO, AND I THINK THE COURT'S RIGHT THERE. NOT ONLY DID THERE HAVE TO HAVE BEEN A THREAT AT THE TIME THE LAWSUIT WAS FILED, BUT IT'S JURISDICTIONAL AND IT HAS TO CONTINUE ALL THE WAY THROUGH, AND I'M NOT SURE WE EVER HAVE HAD A CONCRETE PRODUCT GO FORWARD BY MR. SCHLAFLY, BUT PUTTING THAT ASIDE, THESE COPIED TOGETHER STATEMENTS MADE SOMETIME, I GUESS NOW SIX OR SEVEN YEARS AGO, BY PROFESSOR SCHNORR, BUT PROFESSOR SCHNORR WAS NOT THE ONE WHO HAD THE RIGHT TO ENFORCE THE PATENT AT THE TIME THIS LAWSUIT WAS FILED, THAT WAS PKP, AND THE ONLY EVIDENCE THAT I THINK EXISTS AND IN ANY EVENT, THE ONLY EVIDENCE IN THE RECORD TODAY IS THAT EXCHANGE THAT WAS PROVOKED BY MR. SCHLAFLY WRITING SAYING, STOP SAYING WHATEVER IT IS YOU'RE SAYING ABOUT ME AND THE LETTER BACK SAYING GIVE US THE INFORMATION ABOUT WHAT YOU THINK IT IS. THAT'S THE SUM TOTAL OF WHAT THIS RECORD IS THAT EXISTS. I DON'T THINK THAT'S A THREAT AND IT CLEARLY DOES NOT, I THINK, OBJECTIVELY ARGUE FOR THE NEED FOR THE COURT TO ACT.

ALSO, I THINK IF WE LOOK AT WHERE WE ARE TODAY, PKP HAS BEEN DISSOLVED AS THE COURT IS AWARE OF FROM THE PRIOR PROCEEDINGS, AND THE RIGHTS TO THE PATENT NOW, OF COURSE THE PATENT NOW WITH RSA NOT PKP WHO IS THE PARTY WHO IS NAMED AS THE DEFENDANT. SO, WE DON'T HAVE TODAY A RIPE CASE FOR CONTROVERSY. THERE WAS ONE I

THINK THE COURT POINTED OUT BACK IN 1994 WHEN THIS SUIT WAS FILED.

THE COURT: IF ONE COMES OUT HE CAN CHALLENGE IT, IT'S NOT REALLY AN ISSUE.

MR. HASLAM: I THINK --

THE COURT: IS THAT A CLEAR ENOUGH STATEMENT MR. SCHLAFLY, THAT THEY'RE NOT PURSUING YOU ON THAT ONE AND THERE'S NO NEED TO CHALLENGE IT AT THIS TIME. IT'S PRETTY CLEAR ISN'T IT?

MR. SCHLAFLY: WELL, JUST BECAUSE THE PATENT GOT TRANSFERRED FROM PKP TO RSA, I DON'T THINK IT MAKES ANY DIFFERENCE IN THIS CASE SINCE THEY'RE BOTH PARTIES TO THIS CASE. THERE'S CERTAINLY A LOT OF PEOPLE IN INDUSTRY THAT HAVE COME TO THE CONCLUSION THAT RSA IS THREATENING THAT THE SCHNORR PATENT COVERS THE DSA. I'M NOT THE ONLY ONE WHO COMES TO THE CONCLUSION. IF THEY WANT TO SAY ON THE RECORD TODAY, THAT IT DOESN'T COVER RSA, THEN THE SCHNORR --

THE COURT: THEY SAY THEY'RE NOT PURSUING YOU NOW. THEY'RE NOT RAISING ISSUES NOW. THEY'RE NOT CHALLENGING THE PATENT NOW. THERE MAY BE A LOT OF PATENTS OUT THERE THAT MAY HAVE SOME VALIDITY, BUT WE CAN'T SAY WHETHER THEY'RE VALID OR NOT UNLESS THERE'S A REAL ISSUE INVOLVED IN AN INFRINGEMENT TRIAL. THIS DOES NOT SEEM TO EXIST IN THIS PARTICULAR PATENT, THEY SAY

THAT THE APPROPRIATE TIME, UNLESS IT'S EXPIRED BY THE TIME IT COMES UP --

MR. SCHLAFLY: WELL, IF THEY SENT OUT A LETTER THAT SAYS -- THEY SENT OUT A LETTER TO ONE OF MY CUSTOMERS SAYING YOU NEED TO GET A LICENSE TO THIS SCHNORR PATENT, THAT SEEMS TO BE A FAIRLY DIRECT THREAT TO ME.

THE COURT: AND WHAT DOES -- DID YOU GET A COPY OF THAT LETTER?

MR. SCHLAFLY: YEAH. YEAH, IT'S IN THE EVIDENCE.

THE COURT: YEAH. WHAT'S YOU'RE RESPONSE TO THAT MR. HASLAM?

MR. HASLAM: I'M NOT SURE WHAT LETTER MR. SCHLAFLY IS REFERRING TO. I ASSUME IT'S THE CORRESPONDENCE WITH AT&T WHICH WAS PROFITED BY THE CONCERNS ABOUT WHETHER MR. SCHLAFLY HAD VIOLATED THE CONSENT JUDGMENT WHICH IS INDEPENDENT OF ANY PATENT INFRINGEMENT. REGARDLESS OF WHETHER THE WORLD HAD THE RIGHT TO PRACTICE, MR. SCHLAFLY BY VIRTUE OF CONSENT JUDGMENT WAS PRECLUDED FROM PRACTICING INDEPENDENT OF THE PATENT, BUT THE CORRESPONDENCE WITH AT&T WAS A VERY GENERAL ONE, YOU MAY WANT TO DO SOMETHING, YOU MAY NEED TO MODIFY YOUR LICENSE, AND IT WAS AN OFFER TO SIT DOWN AND NEGOTIATE THE LICENSE WHICH I THINK IS FAR LESS

FEDERAL CIRCUIT FOUND IN SHELL, WHICH DID NOT RAISE A CASE OR CONTROVERSY, AND MUCH MORE AMBIGUOUS THAN WHAT THE COURT IN BP CHEMICALS FOUND WAS NOT A SUFFICIENT THREAT TO A THIRD PARTY TO LET SOMEBODY IN.

MR. SCHLAFLY'S POSITION BRING THE CASE. SO, IF THAT IS THE PEG ON WHICH HE WANTS TO HANG A THREAT, THAT, I THINK THE FEDERAL CIRCUIT HAS SAID IS THE THING YOU WANT TO ENCOURAGE WHICH IS RESOLUTION OF THESE KINDS OF DISPUTES.

I THINK THE FACT WE'RE HERE IN 1997 AND AT&T HAS NOT BEEN SUED ON THE SCHNORR PATENT SPEAKS VOLUMES AS TO WHETHER OR NOT THAT WAS A THREAT OR WHETHER AT&T TOOK IT AS A THREAT, BECAUSE AT&T, THE PARTY MOST DIRECTLY AFFECTED HASN'T FILED FOR DECLARATORY RELIEF.

I THINK WHAT WE HAVE HERE AND I THINK MR. SCHLAFLY CANDIDLY SAID IT, HE WANTS TO BE THE SPOKESMAN FOR THE INDUSTRY HERE. HE SAYS THE INDUSTRY FEELS THREATENED. WELL, I DON'T KNOW OF ANY CASE IN THE FEDERAL CIRCUIT, ANY KIND OF GENERALIZED ANXIETY IN THE INDUSTRY GIVES THIS PERSON THE RIGHT TO CHALLENGE THIS PATENT. THIS IS A CLASSIC CASE OF A PATENT THAT'S OUT THERE THAT PEOPLE HAVE TO TAKE INTO ACCOUNT. THE FEDERAL CIRCUIT HAS SAID TIME AND AGAIN, THE MERE EXISTENCE OF A PATENT, EVEN IF IT HAPPENS TO HAVE AFFECT, IS NOT ENOUGH TO CHALLENGE IT IN OUR SYSTEM, YOU

HAVE TO HAVE THE RIGHT CONTROVERSY AND WE DON'T HAVE IT.

THE COURT: I'LL TAKE IT UNDER SUBMISSION NOW. I THINK THAT THIS MOTION IS PREMATURE. I ACCEPT THE STATEMENT IF YOU ARE CHALLENGED, THE LAWSUIT COMES, THEN YOU HAVE A RIGHT TO CHALLENGE IT, BUT I THINK IT'S PREMATURE. IF YOU WANT ME TO RESERVE JUDGMENT I'LL BE GLAD TO DO IT, BUT OTHERWISE I THINK IT'S PREMATURE.

MR. SCHLAFLY: LET ME JUST ADD, JUST A LITTLE RESPONSE TO THAT. I'M NOT TRYING TO BE A SPOKESMAN FOR THE INDUSTRY. THE REASON WHY I SAID THAT IS BECAUSE THAT'S PART OF -- THAT'S PART OF MY REASON FOR BRINGING THIS IS THAT I WOULD LIKE TO BE ABLE TO SELL DSA PRODUCT WITHOUT THREATS FROM RSA. IF THERE ARE PEOPLE OUT IN THE PUBLIC WHO GENERALLY THINK THAT THIS INFRINGES SCHNORR, THAT'S SOMETHING THEY'RE GOING TO BE CONCERNED ABOUT, AND FOR RSA OR PKP TO SEND LETTER TO ONE OF MY CUSTOMERS SAYING YOU NEED A LICENSE TO THE SCHNORR PATENT, I THINK THAT'S ACTUALLY IN SOME WAYS THAT'S MORE OF A THREAT THAN SENDING A LETTER DIRECTLY TO ME BECAUSE IT INTIMIDATES MY CUSTOMERS AND CAUSES ME TO LOSE BUSINESS.

MR. HASLAM: JUST ONE POINT. I APOLOGIZE FOR NOT HAVING -- US NOT HAVING CITED THIS IN OUR PAPERS, BUT THE LAST COMMENT PROMPTED ME TO THINK OF CYGNUS VERSUS ALZA CASE HANDED DOWN BY THE FEDERAL CIRCUIT

SPEAKS DIRECTLY TO THAT POINT, AND I KNOW BECAUSE I WAS COUNSEL IN THAT CASE, BUT THE FACTS OF RECORD THERE WAS EVIDENCE THAT THE EXISTENCE OF THE ALLAPAT CAUSED A BUSINESS PARTNER OF CYGNUS, AFTER THREE OR FOUR YEARS AND MILLIONS OF DOLLARS OF INVESTMENT, TO WALK AWAY FROM ITS PARTNERSHIP OF CYGNUS, AND CYGNUS THEREFORE CAME TO THE COURT AND SAID, I NEED TO CHALLENGE THE PATENT BECAUSE IT'S HAVING ADVERSE AFFECTS ON ME, AND THE FEDERAL CIRCUIT JUDGE LYNCH, ON SEVERAL MOTIONS, ULTIMATELY DETERMINED THAT GIVEN THE FEDERAL CIRCUIT LAW THERE WAS NO CASE OF CONTROVERSY AND THAT CASE WAS DETERMINED ON APPEAL. AND I THINK THAT, AGAIN WAS FAR FAR CLOSER TO THE KINDS OF FACTS WHICH OF COURSE WOULD LOOK TO SAY MAYBE THERE'S A CASE OR CONTROVERSY. WE'RE LIGHT YEARS AWAY FROM THAT. EVEN IF THERE WERE, THERE'S A REAL WORLD OF FACT JUST BY THE EXISTENCE OF THE PATENT IN ALLEGATION AND SOMEBODY TESTIFIED THERE WAS A REAL WORLD AFFECT BASED ON AN EXISTENCE OF A PATENT, FEDERAL CIRCUIT SAID IT'S NOT ENOUGH AND THAT'S THE ANSWER TO SCHLAFLY'S CONCERNS. IF HE WANTS TO MAKE A PRODUCT AND SELL IT AND PEOPLE ARE CONCERNED WITH ABOUT IT THAT'S THE PRICE WE PAY IN OUR SYSTEM.

THE COURT: MATTER SUBMITTED.

NOW ON MR. SCHLAFLY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON RSA MATTER, DO YOU WISH TO ADD ANY

TO WHAT YOU'VE ALREADY PUT IN THE BRIEFS MR. SCHLAFLY?

MR. SCHLAFLY: YEAH, I'D LIKE TO MAKE A STATEMENT ABOUT THAT IF I COULD.

THE COURT: OKAY.

MR. SCHLAFLY: OKAY, THERE ARE ESSENTIALLY TWO ARGUMENTS THAT THE MIT PATENT IS INVALID, AND ISSUES HERE -- WELL, THE FIRST ARGUMENT IS THAT IT'S INVALID BECAUSE IT'S A PATENT ON A MATHEMATICAL FORMULA. FIRST, I'D LIKE TO SAY IT'S WELL ESTABLISHED THAT THERE IS AN EXCEPTION IN PATENT LAW MATHEMATICAL FORMULAS AND ALGORITHMS ARE NOT PATENTABLE.

THE COURT: BY THEMSELVES.

MR. SCHLAFLY: BY THEMSELVES, RIGHT. THAT'S THE SUPREME COURT OPINIONS, THE FEDERAL CIRCUIT OPINIONS, PATENT OFFICE GUIDELINES, AND EVEN THE DEFENDANTS HERE THEMSELVES, ATTACK SOME OF THE STANFORD CLAIMS ON THAT BASIS. NOW, IF YOU LOOK AT WHETHER OR NOT THE MIT PATENT IS A PATENT ON A MATHEMATICAL FORMULA BY ITSELF AS YOU SAY, I THINK THAT IT IS, BECAUSE I THINK THE WAY TO SEE THAT IS TO LOOK AT WHAT IT IS, WHAT THEY REALLY INVENTED. THE STANFORD PEOPLE INVENTED PUBLIC KEY CRYPTOGRAPHY AND THEY CREATED ALL THOSE NOTIONS THAT WE WENT THROUGH BEFORE: THE ONE WAY FUNCTION, THE COMPUTATIONAL ABILITY, AND THE DIGITAL SIGNATURES, AND ALL THAT STUFF, AND THEY CREATED THE

WHOLE FRAME WORK.

THE COURT: NEW CONCEPT WAS IT?

MR. SCHLAFLY: YEAH, IT WAS A NEW CONCEPT AT THAT TIME, AND THEY PUBLISHED A PAPER AND IN THE PAPER THEY ESSENTIALLY SAID, OKAY, IN ORDER TO MAKE THIS WORK, ALL YOU NEED TO DO IS TO PLUG IN A FORMULA IN THIS CASE THAT HAS THESE PROPERTIES, AND THEN YOU'D HAVE A PUBLIC KEY CRYPTOGRAPHY SYSTEM. WHAT THE MIT PEOPLE DID, THEY FOUND A FORMULA TO PLUG IN, AND THE FORMULA THEY FOUND WAS A PURELY MATHEMATICAL FORMULA THAT SAID, TAKE TWO BIG PRIME NUMBERS, MULTIPLY THEM TOGETHER, THAT GIVES YOU YOUR PUBLIC KEY. THEN TO ENCRYPT YOU TAKE SOME MESSAGE, YOU TREAT IT AS A NUMBER, YOU RAISE IT TO SOME PURE WITH RESPECT TO THAT NUMBER WHICH WAS THE PUBLIC KEY, AND THAT GIVES YOU THE ENCRYPTED THING. IT'S PURELY MATHEMATICAL. MOST OF THE DESCRIPTIONS OF IT, JUST USE A COUPLE FORMULAS AND THAT'S IT, NO HARDWARE, NO ANYTHING, IT'S PURELY WHAT THEY CONTRIBUTED WAS JUST A PURELY MATHEMATICAL FORMULA. THEY DIDN'T DO ALL THE OTHER STUFF THAT THE STANFORD PEOPLE DID AND THAT'S WHAT IT IS.

NOW, IN THE STANFORD PATENT I ARGUED THAT THOSE WERE NONSTATUTORY TOO, BUT I DIDN'T EMPHASIZE THAT -- SEEMED TO ME STANFORD, WELL THEY INVENTED A COMMUNICATION SYSTEM AND THEY INVENTED THIS OTHER STUFF

THAT HAS MORE PHYSICAL ASPECTS TO IT, BUT IN THE CASE OF THE MIT PATENT, ALL IT IS THE FORMULA.

NOW, ACCORDING TO THE CASE LAW IN THIS, THE FORMULA CAN BE PART OF A VALID PATENT CLAIM IF THESE COMPLICATED TESTS, WHICH I'M NOT GOING TO CITE, BUT THERE HAS TO BE SOMETHING PHYSICAL, WHICH IS AN INTRINSIC PART OF THE INVENTION, NOT JUST SOMETHING THAT'S TACT ON LATER. IT HAS TO BE SOMETHING PHYSICAL. THE INVENTION, THE MIT PATENT THERE JUST ISN'T, AND RSA'S ARGUMENT THAT THESE CLAIMS ARE STATUTORY, CHIEFLY RESTS ON THAT THE WORD "SIGNAL" APPEARS IN THE CLAIM. AND I'M SAYING THAT IF A CLAIM BECOMES STATUTORY JUST BECAUSE THE WORD "SIGNAL" IS IN THE CLAIM, THEN THIS EXCEPTION AND PATENT LAW FOR MATHEMATICAL FORMULAS AND ALGORITHMS IS COMPLETELY MEANINGLESS, BECAUSE YOU COULD TAKE ANY OF THE PATENTS THAT HAVE BEEN REJECTED BECAUSE OF MATHEMATICAL FORMULAS AND ALGORITHMS AND JUST INSERT THE WORD "SIGNAL" IN THE CLAIM AND THEN IT BECOMES STATUTORY BY THE RSA ANALYSIS AND THE CLAIM WOULD HAVE THE EXACT SAME SCOPE, AND THE REASON WHY THE ONLY WAY YOU COULD EVER EVALUATE OR USE A FORMULA OR SOME ELECTRONIC GADGET OR SOMETHING, IS TO OPERATE ON SIGNALS. THAT'S THE WAY ELECTRONIC GADGETS WORK, THEY OPERATE ON SIGNALS.

NOW, IT IS TRUE THAT THERE ARE SOME PATENTS

THAT HAVE BEEN UPHELD UNDER THIS MATHEMATICAL ALGORITHM ANALYSIS WHICH INVOLVES SIGNALS AND THE SIGNAL WAS KIND OF CONSIDERED AS SOMETHING PHYSICAL, BUT EXAMPLES OF THOSE ARE PATENTS ON SYSTEMS INVOLVING SEISMIC SIGNALS OR ELECTROCARDIOGRAM SIGNALS, BUT THE DIFFERENCE IN THOSE CASES IS THAT THE SEISMIC -- IS THAT THOSE SIGNALS AND THOSE PATENTS ARE MEASURING SOMETHING PHYSICAL. THE SEISMIC SIGNAL IS MEASURING THE MOVEMENTS OF THE GROUND, THE ELECTROCARDIOGRAM IS MEASURING HUMAN HEART BEATS, AND THAT THOSE NUMBERS THAT ARE THEN PLUGGED INTO SOME FORMULA OR PART OF SOME SYSTEM THERE, THOSE NUMBERS ARE REPRESENTING PHYSICAL ENTITIES OF SOME KIND. IN THE CASE OF THE MIT PATENT, THE NUMBERS THAT ARE BEING PLUGGED INTO THEIR FORMULA ARE NOT MEASUREMENTS OF SOMETHING PHYSICAL, THEY'RE NOT MEASUREMENTS OF ANYTHING AT ALL, THEY'RE JUST BITS. COMPUTERS STORE INFORMATION AS BITS, THE ZEROS AND ONES. AND FOR THE RSA FORMULA, YOU JUST TAKE A BUNCH OF THOSE ZEROS AND ONES AND ASSEMBLE THEM TOGETHER TO MAKE SOME NUMBER OUT OF IT AND PLUG IT INTO A FORMULA, BUT THAT NUMBER YOU GET IS NOT A MEASURE OF ANYTHING, MUCH LESS SOMETHING PHYSICAL, AND SO THAT FORMULA IS AS PURE MATHEMATICAL FORMULA PATENT AS ANY OF THE CASES. IT'S A MORE PURELY MATHEMATICAL PATENT THAN MOST OF THE PATENTS THAT HAVE GOTTEN REJECTED FOR BEING MATHEMATICAL ALGORITHMS. SO FOR

THOSE REASONS I THINK THIS PATENT SHOULD BE REJECTED FOR BEING A -- IS BECAUSE WHAT THE PATENT IS COVERING IS PURELY MATHEMATICAL FORMULA AND THERE'S ALSO AN ESTOPPEL ARGUMENT, BUT MAYBE IT WOULD BE BETTER IF I LET THE OTHER SIDE ADDRESS WHAT I JUST SAID.

THE COURT: IF THERE IS NO ADDITIONAL PROCESS FOR A MACHINE OR AN UNUSUAL PROCESS MATTER, IF IT HAS A PROCESS, DOES IT TAKE IT BEYOND THE FORMULA, THE FORMULA PRODUCED IF IT'S A PROCESS BY WHICH THE MACHINE IS OPERATED?

MR. SCHLAFLY: IF THEY INVENTED A PROCESS THAT DOES SOMETHING PHYSICAL. FOR EXAMPLE, THE SUPREME COURT CASE IN THIS, IS A RUBBER CURING PROCESS WHERE THE FORMULA -- THEY PROVED THERE WAS KIND OF A FORMULA, MATHEMATICAL FORMULA ALGORITHM PATENT SORT OF, BY THE HEART OF THE FORMULA -- THE HEART OF THE PATENT WAS DECIDING HOW AND WHEN TO CHANGE THE TEMPERATURE IN SOME RUBBER MOLDING THING, AND THERE IT'S A PROCESS -- IT'S A PHYSICAL PROCESS, BECAUSE IT'S A PROCESS OF MAKING RUBBER. IF YOU HAVE A PROCESS THAT'S JUST PURELY MATHEMATICAL, IT JUST SAYS TAKE SOME NUMBERS AND PLUG THEM INTO SOME FORMULA AND GET AN OUTPUT NUMBER, THEN THAT'S NOT PATENTABLE.

THE COURT: IN THIS CASE THE PROCESS OF BEING ABLE TO IDENTIFY WHO THE SENDER IS AND DE-CODE IT

BECAUSE YOU HAVE A SECRET NUMBER, IT'S NOT A PATENTABLE PROCESS. THAT'S JUST A MATHEMATICAL UNDERTAKING THAT HAS NO NEW PROCESS. IS THAT WHAT YOU'RE SAYING?

MR. SCHLAFLY: IF THEY HAD INVENTED -- IF WHAT THE MIT FOLKS HAD INVENTED WAS SOME BIGGER SYSTEM WHERE THEY INVENTED THE IDENTIFICATION SYSTEM OR THE COMPUTER EQUIPMENT OR SOMETHING ELSE THAT INVOLVED SOMETHING PHYSICAL, THEN IT'S POSSIBLE THAT THAT COULD BE STATUTORY, BUT THAT'S NOT WHAT THEY INVENTED. THEY JUST INVENTED THE FORMULA THAT PLUGGED INTO THE STANFORD INVENTION. THE STANFORD PEOPLE INVENTED THE AUTHENTICATION LOGIC AND ALL THAT STUFF.

THE COURT: OKAY, LET'S HEAR FROM THE OTHER SIDE.

MR. SCHLAFLY: OKAY.

THE COURT: MR. HASLAM.

MR. HASLAM: JUST BRIEFLY, I THINK THE FIXATION OF MR. SCHLAFLY ON THE ALGORITHM OR THE MATHEMATICAL CONCEPTS, TO SOME EXTENT I CAN UNDERSTAND WHERE IT COMES FROM, HAVING READ ALL OF THESE, BUT I THINK AL PATH, PERHAPS TO SYNTHESIZE -- IT'S 33 F 3RD, 1542, WHERE IT SAYS A CLOSE ANALYSIS OF DEER, FLUKE, AND BENSON REVEALS THAT THE SUPREME COURT NEVER INTENDED TO CREATE AN OVERLY BROAD FOURTH CATEGORY OF SUBJECT MATTER EXCLUDED FROM SECTION 101, RATHER AT THE CORE OF THE

COURT'S ANALYSIS IN EACH OF THESE CASES LIES AN ATTEMPT BY THE COURT TO EXPLAIN A RATHER STRAIGHT FORWARD CONCEPT, NAMELY THAT CERTAIN TYPES OF MATHEMATICAL SUBJECT MATTER STANDING ALONE REPRESENT NOTHING MORE THAN ABSTRACT IDEAS UNTIL REDUCED TO SOME TYPE OF PRACTICAL APPLICATION. I THINK THAT THE COURT'S QUESTIONS I THINK, INDICATE THAT IN THIS CASE, WE'VE GONE FAR BEYOND THE DISCOVERY AND THE ATTEMPT TO PATENT A MATHEMATICAL CONCEPT OR ABSTRACT IDEA. THE ARGUMENT THAT MR. SCHLAFLY MADE IN PART, ON WHETHER THIS IS REALLY A PROCESS OR A NOVEL AND USEFUL MACHINE, RESTS ON THE FACT THAT IT CAN BE DONE WITH RELATIVELY SIMPLE HARDWARE, BUT THERE'S NOTHING IN THE CASE LAW THAT SAYS THE FACT THAT THIS PATENT CAN BE PRACTICED WITH RELATIVELY STRAIGHT FORWARD DISCRETE OR GENERAL PURPOSE COMPUTERS, SAYS NOTHING ABOUT WHETHER IT'S PATENTABLE.

IN ADDITION, WHEN WE LOOK AT WHAT IT IS THAT THE MIT PEOPLE INVENTED, THEY DIDN'T DISCOVER SOME MATHEMATICAL CONCEPT AND ATTEMPT TO TAKE THAT OUT OF THE PUBLIC DOMAIN. WHAT THEY RECOGNIZED AND INVENTED WAS A RELATIONSHIP BETWEEN SEVERAL THINGS: THE USE OF FACTORING, THE USE OF OILER'S FUNCTION TO RELATE E AND D WITH C, AND THEN THE FACT THAT IF YOU DID THAT, YOU COULD THEN DO THE DECRYPTION EXPONENTIATION STEP IN N WHICH IS THE PRODUCT OF P AND Q. BUT THE IMPORTANT

THING IS, EXPONENTIATION HASN'T BEEN TAKEN OUT OF PUBLIC DOMAIN. OILER'S FUNCTION HASN'T BEEN TAKEN OUT OF THE PUBLIC DOMAIN. WHAT'S BEEN TAKEN OUT OF THE PUBLIC DOMAIN IS THAT RELATIONSHIP WHEN USED IN THE USEFUL PROCESS OR MACHINE FOR ENCRYPTING, SENDING, AND DECRYPTING MESSAGES, OR IN SIGNING FOR IN A DIGITAL SIGNATURE IN A MESSAGE.

AND THE FINAL POINT I'D LIKE TO MAKE IS, MR. SCHLAFLY'S DENIGRATION OF THE MIT PATENT IS SIMPLY BEING BITS, BUT ALL OF THESE OTHERS BEING SOME PHYSICAL SIGNAL REPRESENTING SOMETHING. IN THE COMPUTER THEY'RE ALL BITS. IN THE PATENT WITH THE RUBBER, WHEN THE ALGORITHM AND MACHINE IS PROCESSING, IT'S PROCESSING IT IN BITS, AND THE MIT PATENT, THAT MESSAGE COULD BE IF YOU WANT TO SEND IT ENCRYPTED, COULD BE THE SIGNAL FROM THE HEART RHYTHM. IT IS A MESSAGE. IT IS A PHYSICAL MANIFESTATION OF A PHYSICAL PROCESS OR OBJECT. IT IS USEFUL INFORMATION WHICH IS DEVELOPED OR HELD BY ONE PERSON SENT TO ANOTHER, AND THERE'S NOTHING IN THE PATENT LAW THAT SAYS BECAUSE IT'S INFORMATION IT'S SOMEHOW -- THAT INFORMATION WHICH IS IN THE FORM OF SIGNALS, SOMEHOW LOSES PATENTABILITY, WHEN INFORMATION WHICH HAPPENS TO BE REPRESENTATIVE OF A HEART SIGNAL, SOMEHOW GETS SOME ELEVATED STATUS.

SO, I THINK THE BOTTOM LINE IS THAT THIS

PATENT WAS SUBJECT MATTER, AND PATENT CASES AFTER IT SAY SO. THE CLAIM LANGUAGE IS IMPORTANT WHETHER WE LIKE IT OR NOT, WHETHER WE WANT TO DENIGRATE IT IN MAGIC WORDS I THINK IT WOULD BE ARRHYTHMIA, SCHRADER, AND WARMERDAM. IT'S CLEAR THAT THE FACT, THAT THE SIGNALS ARE THE HALLMARK -- THAT IS THE MAGIC WORD -- IT IS THE HALLMARK OF THE FACT THAT THERE IS SOMETHING HERE THAT IS BEYOND THE MATHEMATICAL IDEA. IT IS BEING USED IN A USEFUL OR NEW PROCESS --

THE COURT: EVEN THOUGH COMPLETELY ON EXISTING EQUIPMENT --

MR. HASLAM: COMPLETELY --

THE COURT: -- NEW CONCEPTS ARE DEVELOPED TO COVER RESULT WITHOUT HAVING TO BUILD EQUIPMENT OR ANYTHING ELSE. IT'S STRICTLY TO USE ON EXISTING EQUIPMENT AND THAT'S SUFFICIENT?

MR. HASLAM: I THINK THE SUPREME COURT, AND I KNOW THE FEDERAL CIRCUIT HAS SAID MOST PATENTS ARE A COMBINATION OF OLD IDEAS. IT'S USING ABC AND D, ALL OF WHICH ARE IN A PRIOR ART IN A NEW AND USEFUL WAY. SO THE FACT THAT IT HAPPENS TO BE SOMETHING THAT THEY DISCOVERED, CAN BE RUN ON A GENERAL PURPOSE COMPUTER WORK OR WITH SHIFT REGISTERS OR REGISTERS AND COMMUNICATION NETWORKS DOESN'T MATTER. I MEAN HE HAS CONCEDED -- HE SAYS NOW, I'M NOT SURE HE DID EARLIER --

THE VALIDITY OF THE STANFORD PATENTS. STANFORD PATENTS WERE ALL RUN ON EQUIPMENT THAT EXISTED LONG BEFORE THE INVENTION OF THE STANFORD PATENT, WHATEVER THAT INVENTION WAS. I MEAN THE DISCRETE ELEMENTS, THEY DIDN'T INVENT THE DISCRETE ELEMENTS. THE MEMORY AND THE BARREL SHIFTERS AND THE ADDERS AND SUBTRACTORS, IT WAS ALL PREEXISTING. WHAT THEY INVENTED WAS SOME NARROW WAY OF PRACTICING SOMETHING THAT THEY CAME UP WITH ON THAT PREEXISTING EQUIPMENT. AND I ALSO THINK, TO THE EXTENT THAT WE GO BEYOND THE SIGNALS AND WE GO TO ALLAPAT, THE FACT IS THAT THESE CLAIMS DO DESCRIBE USEFUL MACHINES, AND THE FACT IT CAN BE DONE WITH SIMPLE EXISTING TECHNOLOGY, DOESN'T TAKE AWAY FROM PATENTABILITY. I MEAN ALLAPAT WENT THROUGH AND SAID, WHEN THEY PLUGGED IN THE PHYSICAL ELEMENTS FROM THE SPECIFICATION OF THE CLAIM, YOU HAD BARREL SHIFTERS AND THOSE KINDS OF THINGS, AND THEY SAID IT'S A NEW AND USEFUL MACHINE WHICH IS WHAT ALLAPAT SAYS, WHEN YOU GO BEYOND A PURE MATHEMATICAL CONCEPT, A NEW AND USEFUL MACHINE OR PROCESS, YOU HAVE WHAT IS CALLED FOR IN SECTION 101.

THE COURT: THANK YOU.

YOU'RE RESPONSE?

MR. SCHLAFLY: YEAH, JUST BRIEFLY. I THINK MR. HASLAM HERE IS MISREADING ALLAPAT. TO SAY JUST BECAUSE SOMETHING IS PRACTICAL, OR JUST BECAUSE

SOMETHING IS NEW AND USEFUL, THAT MAKES IT STATUTORY. THERE IS REQUIREMENT -- ALL PATENTS HAVE TO BE NEW AND USEFUL, AND THEY HAVE TO BE PRACTICAL. THAT'S A REQUIREMENT ANYWAY, AND THAT HAS NOTHING TO DO WITH THE MATHEMATICAL ALGORITHM EXCEPTION.

SUBSEQUENT TO ALLAPAT, SOME AL PATS HAVE BEEN KNOCKED OUT FOR BEING MATHEMATICAL ALGORITHMS. WARMERDAM WAS ONE, STATE STREET BANK WAS ANOTHER. NOBODY DENIED THAT THOSE INVENTIONS WERE PRACTICAL, OR NEW OR USEFUL. IT WAS -- AND THAT'S JUST NOT THE STANDARD THAT'S APPLIED. THE STANDARD THAT'S APPLIED, ARE THE INVENTOR'S KIND OF MATHEMATICAL ALGORITHM OR ABSTRACT IDEA.

THE COURT: THANK YOU. VERY WELL BRIEFED AND WELL ARGUED, AND SOMETIMES -- ACTUALLY, MANY TIMES, IT'S MORE PRODUCTIVE IF THE PARTIES CAN WORK IT OUT THEMSELVES RATHER THAN RELY UPON A COURT. HOWEVER, I THINK WE HAVE ENOUGH BRIEFING ON IT, TO RULE OR MAKE A DECISION. WE'LL DO SO AS SOON AS WE CAN, UNLESS WE GET WORD YOU'VE COME TO A SETTLEMENT BY YOURSELVES, WHICH I RECOMMEND.

THAT'S ALL. ANYTHING ELSE? THANK YOU.

THE CLERK: COURT IS NOW ADJOURNED. ALL RISE.

(PROCEEDING ENDED AT 10:35 A.M.)

REPORTER'S CERTIFICATE

I, THE UNDERSIGNED COURT REPORTER FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF PROCEEDINGS HAD ON THE WITHIN-ENTITLED AND NUMBERED CAUSE ON THE DATE HEREINBEFORE SET FORTH; AND I DO FURTHER CERTIFY THAT THE FOREGOING TRANSCRIPT HAS BEEN PREPARED BY ME.

Tonya Negd

TONYA C. NEGD, CSR# 11486